Office-Supreme Court, U.S.
FILED
AUG 4 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-5466

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

EDWARD G. WELSH

PETITIONER,

v.

STATE OF WISCONSIN,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF WISCONSIN

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. THE NATURE AND QUALITY OF THE UNDERLYING OFFENSE, AS DETERMINED UNDER STATE LAW, IS RELEVANT IN MEASURING THE REASONABLENESS OF THIS NONCONSENSUAL AND WARRANTLESS ENTRY INTO THE DEFENDANT'S HOME

Respondent's argument does not support the home arrest of Edward Welsh on the grounds advanced by the Supreme Court of Wisconsin (Brief of Respondent at 11). The State makes the unusual

argument that this Court can ignore the Wisconsin Supreme Court's conclusion that the defendant was arrested under a Wisconsin statute authorizing arrests of traffic offenders. The State's claim is without support. On matters of state law this Court has long held that state courts speak with final authority, unless in so doing they violate constitutionally protected rights. Justice Jackson summarized the rule:

> "Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions."

Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945); see also Florida v. Casal, ___ U.S. ___, 51 U.S.L.W. 4827 (June 17, 1983) (Burger, C.J. concurring); Kolender v. Lawson, ___ U.S. ___, 51 U.S.L.W. 4532, 4533 (May 2, 1983);

Murdock v. Memphis, 20 Wall. 590, 635 (1875); see generally C. Wright, Handbook of the Law of Federal Courts 488 (2nd ed. 1970).

The respondent confuses the arrest with the charge (Brief of Respondent at 8). The reasonableness of defendant's arrest is the issue, and reasonableness involves the arrest statute, not the subsequent charging decision as respondent suggests (Brief of Respondent at 10-11). The penalty for first offenders arrested for traffic offenses is a civil forfeiture.

The penalty a state attaches to an offense helps measure the reasonableness of a trial by judge alone, Baldwin v. New York, 399 U.S. 66, 68 (1970); Duncan v. Louisiana, 391 U.S. 145, 160 (1968). It has likewise considered the penalties attached under state law in determining whether a penalty is cruel and unusual,

Solem v. Helm, ___ U.S. ___, 51 U.S.L.W. 5019, 5024 n.20 (June 28, 1983). Similarly one of the components of reasonableness under the Fourth Amendment's standards is the seriousness with which the government views an offender. McDonald v. United States, 335 U.S. 451, 459 (1948) (Jackson, J., concurring); Dorman v. United States, 435 F.2d 385, 392 (D.C. Cir. 1970 en banc). Reasonableness is measured by balancing the invasion which occurs with the governmental interest asserted to justify a seizure, see Terry v. Ohio, 392 U.S. 1, 20-21 (1968); Camara v. Municipal Court, 387 U.S. 523, 535 (1967). Wisconsin's Supreme Court plainly identified the governmental interest here as an application of its traffic arrest statute.

Respondent invokes, as authority for an independent review of the statutory basis for defendant's arrest, the prin-

ciple that not every violation of state arrest law triggers a violation of the Fourth Amendment, see Street v. Surdyka, 492 F.2d 368, 370 (4th Cir. 1974), Brief of Respondent at 22-24. Street was correctly decided, but it does not supply any authority suggesting that this Court should ignore the Wisconsin Supreme Court's characterization of the defendant's arrest.

II. WHETHER WISCONSIN'S POLICE COULD HAVE LAWFULLY ARRESTED THE DEFENDANT OUTSIDE HIS HOME FOR THE OFFENSE CHARGED IS NOT AN ISSUE FOR THIS COURT

The respondent asserts that the defendant claims that he "could not constitutionally be arrested even for the misdemeanor offense of drunk driving and even in a public place." (Brief of Respondent at 13.) This argument was suggested in the Wisconsin Supreme Court in the dissenting opinion of Justice

Abrahamson. The defendant only states that the common law rule, forbidding arrests for minor offenses not committed in the presence of the police, and not constituting a breach of the peace, "is sound, especially as it applies to warrantless nonconsensual entries into the home." (Brief of Petitioner at 34.) We argue that the exigent circumstances doctrine does not justify a home entry here. Contemporary norms and conditions, relevant in evaluating the reasonableness of a search and seizure, confirm the common law. People are entitled to more protection in their homes than outside, and governmental invasions of that privacy must be subjected to extraordinarily strict scrutiny, cf. Bolger v. Young's Drug Products, ___ U.S. ___, 51 U.S.L.W. 4961, 4966 (June 24, 1983) (Rehnquist, J., and O'Connor J. concurring).

The defendant does not claim that a state may never allow arrests for minor offenses unless committed in the presence of the police (Brief of Respondent at 13). The defendant does point out, however, that such power is rarely asserted and is contrary to the thoughtful recommendations in the American Law Institute's Model Code of Pre-Arraignment Procedure. (Brief of Petitioner at 28). See also State v. Cormican, 292 Minn. 505, 195 N.W.2d 586 (1972). Moreover, even the law of Wisconsin ordinarily commands that magistrates issue summons in preference to warrants (Brief of the Wisconsin Civil Liberties Union Foundation at 22). Whether or not Wisconsin law authorizes arrests for minor out of presence offenses must first be evaluated under the Law of Wisconsin. The majority in the Supreme Court of Wisconsin did not focus upon

that issue (see State v. Welsh, 108 Wis. 2d 319, 344, 321 N.W.2d 245, 258, J.A. 180 (Abrahamson, J. dissenting). It would, of course, be bizarre to allow a policeman to enter a home but forbid a magistrate at his elbow from issuing a warrant to authorize the entry.

III. THE ISSUE BEFORE THIS COURT IS WHETHER SUFFICIENT JUSTIFICATION EXISTED TO PERMIT A WARRANTLESS NONCONSENSUAL ENTRY, NOT WHETHER PROBABLE CAUSE EXISTED

The Supreme Court of Wisconsin found, and the respondent continues to assert, that the police had probable cause to arrest Edward Welsh (Brief of Respondent at 33-34). That is not the problem. Defendant claims that even if the informer's testimony, coupled with Officer Daley's suspicions, supplied probable cause to arrest (see Illinois v. Gates, ___ U.S. ___, 51 U.S.L.W. 4685 (June 8, 1983)), there was insufficient

justification to authorize a nonconsensual warrantless entry into Welsh's home. Probable cause to arrest does not establish justification to enter, Payton v. New York, 445 U.S. 573, 583 (1980). In 1981 a unanimous House of Lords confirmed this rule by holding that police could not enter a home to arrest a suspect to administer a blood test. Finnigan v. Sandiford, Clowser v. Chaplin, [1981] 2 All E.R. 267.

IV. THE "HOT PURSUIT" DOCTRINE IS INAPPLICABLE TO THIS CASE

Respondent invokes the "hot pursuit" doctrine (Brief of Respondent at 34). That doctrine, evidently a branch of the exigent circumstances rule, evolved uncertainly in the context of police engaged in a chase of a suspect who had no

right to flee.* In this case, however, the State has not claimed that Edward Welsh had a duty to stand by his automobile and wait. Of course such a duty would exist had there been injury or damage, see Wis. Stat. 346.67.[1]

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*If the defendant had been stopped at his door, the police could have pursued to make an arrest. Hart v. Chief Constable of Kent, [1983] Crim. L.R. 117 (Queen's Bench, D.C.).

[1]346.67 Duty upon striking person or attended or occupied vehicle. (1) The operator of any vehicle involved in an accident resulting in injury to or death of any person or in damage to a vehicle which is driven or attended by any person shall immediately stop such vehicle at the scene of the accident or as close thereto as possible but shall then forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled the following requirements:

(a) He shall give his name, address and the registration number of the vehicle he is driving to the person struck or to the operator or occupant of or person attending any vehicle collided with; and

(b) He shall, upon request and if

Indeed, had there been injury or damage the suspect could have been sought for a more serious offense. In some cases the failure to remain at the scene of an accident is a felony, see State ex rel McDonald v. Douglas Cty. Cir. Ct., 100 Wis.2d 569, 302 N.W.2d 462 (1981). No one was injured, no damage was done, and hence Edward Welsh did what the law allows, he went home to bed!

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available, exhibit his operator's license to the person struck or to the operator or occupant of or person attending any vehicle collided with; and

(c) He shall render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person.

V. INASMUCH AS THE UNDERLYING OFFENSE WAS NOT CONSIDERED SERIOUS BY THE STATE, AND BECAUSE OF THE ABSENCE OF AN URGENT EMERGENCY, THE EXIGENT CIRCUMSTANCES DOCTRINE IS NOT APPLICABLE TO THIS CASE

The emergency which the State of Wisconsin claims justifies the home entry and arrest in this case is the fact that the percentage of alcohol in the blood in due course drops to zero (Brief of Respondent at 37). It does so not immediately but over a period of time. Blood tests are permitted now within three hours of the time of arrest, and longer if experts testify on reliability (Brief of Respondent at 42). In one of the cases respondent cites a reliable blood test was taken four hours after the offense, State v. Oevering, 268 N.W.2d 68 (Minn. 1978).

The cases cited by respondent (Brief of Respondent at 38) all involve one of several situations:

1) Where a defendant was lawfully arrested and subjected to a blood alcohol test, either after, or contemporaneously with, a lawful arrest. United States v. Harvey, 701 F.2d 800 (9th Cir. 1983); Commonwealth v. Trefry, 249 Pa. Super. 117, 375 A.2d 786 (1977); Gregg v. State, 374 So.2d 1301 (Miss. 1970); Shultz v. State, 417 N.E.2d 1127 (Ind. Ct. App. 1981).

2) Where the offense took place in the presence of the officer. See State v. Penas, 200 Neb. 387, 263 N.W.2d 835 (1978) (Brief of Respondent at 35); People v. Bell, 41 Ill. App. 3d 233, 355 N.E.2d 38 (1976); State v. Niedermeyer, 48 Ore. App. 665, 617 P.2d 911 (1980), cert. denied, 450 U.S. 1042 (1981) (Brief of Respondent at 32 n.11); see also Illinois v. Batchelder, ___ U.S. ___, 51 U.S.L.W. 3933 (July 6, 1983) (per curiam).

3) Where the defendant was in a hospital and a blood test was sought in circumstances where no privacy interest was invaded. People v. Rodriguez, 645 P.2d 857 (Colo. Ct. App. 1982); State v. Williams, 417 So. 2d 755 (Fla. Ct. App. 1982 - 3 hours after accident); DeVaney v. State, 259 Ind. 483, 288 N.E.2d 732 (1972); State in Interest of M.P.C., 165 N.J. Super. 131, 397 A.2d 1092 (1979); Hayes v. State, 634 S.W.2d 359 (Tex. Ct. App. 1982); Aliff v. State, 627 S.W.2d 166 (Tex. Ct. App. 1982); State v. Campbell, 615 P.2d 190 (Mont. 1980); State v. Oevering, 268 N.W.2d 68 (Minn. 1978); Pollard v. State, 439 N.E.2d 177 (Ind. Ct. App. 1982). Medication and treatment may diminish the value of a delayed blood alcohol test. Hence, the warrant requirement is excused.

In all of these cases the police, when they sought a blood alcohol test,

were where they had a right to be. Police had no right to be in Edward Welsh's home unless they entered with consent, or with a warrant. They were in no legitimate position to either arrest, or to observe, the defendant. See Texas v. Brown, ___ U.S. ___, 51 U.S.L.W. 4361, 4363 (April 19, 1983).

VI. A DECISION FAVORING THE DEFENDANT WOULD NOT HAMPER LAW ENFORCEMENT

Respondent asserts that the defendant's claim would, if honored, "not allow the police to enter a home to stop a battery," or "make a warrantless entry into a home to stop a crime of violence." (Brief of Respondent at 45). This is not defendant's claim. Anyone, including the police, may enter a home to save life or limb, or to render necessary first aid. Such entries are allowed under the "emergency doctrine."

(Brief of Petitioner at 54 n.28). This case would be entirely different had police at the door heard the sound of breaking crockery and a cry for "help!"

This Court has implied, and other courts have uniformily held, that expediency does not create exigency. (Brief of Petitioner 60-62.) See also Michigan v. Anthony, 120 Mich. App. 207, 327 N.W.2d 44 (1982), cert. denied, ___ U.S. ___, 51 U.S.L.W. 3872 (June 6, 1983); Finnigan v. Sandiford, cited p. 9 supra (House of Lords, 1981).

CONCLUSION

For the reasons previously stated, the judgment in this case should be reversed.

Respectfully submitted,

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